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No. 86

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

GEORGE GEBRAYEL
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SEPTEMBER 9, 1986

QUESTIONS PRESENTED

1. Where Congress has emphatically spoken that should the Secretary of the Treasury prescribe a report for domestic currency transactions such report shall be signed **both by the financial institution in question and one or more of the participants to the transactions**, may the Secretary of Treasury unilaterally prepare his own form where only the financial institutions can sign and may petitioner be found guilty of failing to file such form?

2. As applied to petitioner, 31 U.S.C. § 5322(b) is unconstitutionally vague and therefore void; or alternatively, should not apply to petitioner.

3. Is it denial of petitioner's due process for the government to object to the introduction of a prior inconsistent statement voluntarily given to petitioner's counsel by the government's star

witness?

4. It is an abuse of discretion by the trial court to deny an evidentiary hearing on newly discovered evidence requested by petitioner and the government, where the court assumed the truthfulness of petitioner's allegations, and where the star witness was allowed to withdraw the plea of guilty to the charge of conspiracy one year after the entering of such a plea leaving petitioner the only conspirator?

5. It is prosecutorial misconduct and a deprivation of petitioner's right to a fair trial for the government to refer to petitioner's conduct as laundering money when government admitted at sentencing that petitioner was never engaged in such conduct nor was he suspected of any such conduct?

6. Was petitioner entitled to a jury instruction on entrapment since the

indictment was a result of a sting operation and petitioner had no prior criminal record?

7. (a) Where evidence seized pursuant to an illegally obtained search warrant, later acknowledged to be illegally obtained and not in good faith, evidence subsquently used against petitioner, was it abuse of discretion by the trial court (1) to deny an evidentiary hearing prior to trial? (2) To postpone such a hearing until after trial? (3) Fail to conduct a hearing and allow all of the evidence illegally seized to be used against petitioner during the course of the trial resulting in violation of petitioner's constitutional right under the Fourth Amendment?

(b) Was it incumbent upon the trial court to search the record for such evidence or may it summarily deny the motion to suppress?

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1986

GEORGE GEBRAYEL

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

George Gebrayel petitions this court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit that "entered against him."

OPINIONS BELOW

In July 1984, the district court entered a judgment of conviction upon a jury verdict, denied petitioner's motion of aquittal or a new trial, and sentenced petitioner to a term of imprisonment. To the best of petitioner's belief, that decision was not recorded. In April of 1986, the Ninth Circuit in a memorandum

opinion, not for publication, denied petitioner's request for reversal, or in the alternative, for a new trial. While the appeal was pending in the Ninth Circuit Court of Appeal, petitioner filed a motion for evidentiary hearing on newly discovered evidence. The government joined in that motion. The district court, Judge Alfredo Marquez, sitting by designation, denied the motion. A timely appeal was filed with the Ninth Circuit Court of Appeals on that motion. The two cases were consolidated. The Ninth Circuit Court in this memorandum opinion denied petitioner's motion for a new trial.

JURISDICTIONAL STATEMENT

This petition seeks review of a judgment that the United States Court of Appeals entered on April 30, 1986. The petition for rehearing and suggestion for

rehearing en banc were denied on July 9, 1986. (Appendix 1). The present petition was filed on September 9, 1986. This court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first two questions presented concern the proper Construction of Public Law 91-508 later codified as Title 31 of U.S.C. § 1051 et seq. The third question deals with the rule of Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971), and whether petitioner may invoke such rule against the government. The fourth question deals with the discretion of the district court, the scope of such discretion and whether it allows the trial judge to deny an evidentiary hearing on newly discovered evidence where such hearing is requested by the government

and petitioner. The fifth question addresses petitioner's right to due process of law under the Fifth Amendment to the Constitution and whether prosecutorial misconduct was of such outrageous nature as to have denied such right to petitioner. The sixth question addresses the issue of the right of petitioner to an instruction on entrapment and whether its denial of due process of law to be denied such instructions. The seventh question raises the issue of the trial court's discretion in summarily denying a motion to suppress illegally obtained evidence prior to and after trial, when the government admitted by implication that such evidence was illegally obtained and in bad faith.

STATEMENT OF THE CASE

Petitioner (originally from Lebanon and without prior bank managerial exper-

ience, where banking transactions are shrouded in secrecy more so than Switzerland) was formerly a Vice Chairman of the Board of Directors of the newly opened Pan American International Bank in Las Vegas, Nevada. The bank was the subject of a federal "sting" investigation in which an undercover agent brought large sums of cash to the bank insisting that the money be handled with secrecy. The "sting" culminated in the indictment of the bank and its officers, including the Chairman of the Board of Directors, Rafael Acosta, petitioner and the bank's head cashier, Richard Rodriguez.

In an ex parte confidential pre-trial memorandum submitted to the trial judge (A-32) (which was ultimately released to the defense) (CR 189), the prosecutor made his pitch about "laundering drug money."

In November, 1983, co-conspirator Richard Rodriguez entered a plea of guilty to the charge of conspiracy with the other charges being dropped against him. In January 1984, the Bank entered a plea of guilty to fail to file Currency Transaction Reports (CTR). The Bank was fined $125,000; $95,000 of which was suspended and the $30,000 to be paid at the rate of $6,000 per year for five years.

At a jury trial, defendant Acosta was acquitted. Petitioner was found guilty of conspiracy [18 U.S.C. § 371]; failure to file Currency Transaction Reports ("CTR") [31 U.S.C. §§ 5313, 5322; 31 CFR §§ 103.22 and 103.25]; and aiding and abetting on the filing of a false currency transaction report [18 U.S.C. §§ 2, 1001] (CR 205).

On October 5, 1984, petitioner was sentenced to two years imprisonment on

the conspiracy count and a five year probation on the remaining counts (ER I, IX); petitioner filed a timely notice of appeal to the Ninth Circuit from his conviction the same day (84-1296).

On September 19, 1984, co-conspirator Rodriguez moved the court to set aside his judgment of conviction of conspiracy and to withdraw his plea of guilty (CR 222), pursuant to a suggestion to that effect from the trial prosecutor, Assistant United States Attorney, Donald J. Campbell. (A-42) Mr. Campbell represented that during an interview with Rodriguez two days before the trial, Campbell first learned that Rodriguez did not have a history of corrupt reporting abuses during his earlier work at Pioneer Citizens Bank. Thus, Rodriguez' conviction as a co-conspirator was sought to be set aside for what prosecutor Campbell termed an "injustice." After a hearing

on October 18, 1984, (CR 234), the court, on October 22, 1984, granted Rodriguez' motion, set aside Rodriguez' judgment of conviction and ordered the withdrawal of the plea of guilty to the conspiracy count. The court further ordered opposing counsel to meet and discuss the disposition of the case and to report to the court a proposal for intended disposition. (CR 234). The Rodriguez matter has lain dormant since his conviction was vacated. Petitioner, through one of his counsels, first learned of the Rodriguez plea withdrawal in the early part of November 1984.

These circumstances regarding co-conspirator Rodriguez were the basis of petitioner's motion for a new trial on the ground of newly discovered evidence. The government joined in such a motion. The Honorable Judge Alfredo Marquez never set an evidentiary hearing on the issues.

Relying on United States v. Bagley, U.S. 1985, 105 Sup. Ct. 3375, the trial court summarily denied petitioner's motion for a new trial on August 14, 1985 - while assuming petitioner's allegations to be true. Petitioner timely appealed (85-1277) and both cases were consolidated.

On April 30, 1986, the Ninth Circuit Court of Appeal affirmed petitioner's conviction on all counts. (A-3) On May 14, 1986, petitioner filed with the Circuit Court of Appeals a motion for a rehearing and a suggestion of rehearing en banc. Such motion was denied on July 9, 1986. (A-1) The mandate issued on July 18, 1986. On August 12, 1986, petitioner filed the motion for stay of mandate pending application for review on certiorari. The motion was received late and the mandate had issued. The motion

to recall the mandate was filed on August 20, 1986.

STATEMENT OF MATERIAL FACTS

Prior to opening for business on July 19, 1982, the Pan American International Bank ("PAIB") was targeted by the government for a "sting" operation. Accordingly, the government sought to introduce an undercover agent from the criminal investigation division of the Internal Revenue Service, to the management of the bank. The agent, Michael Berry, represented himself to be a mexican Major with the Department of Police and Traffic for the Federal District of Mexico. He had been given credentials by the Mexico City Police Department as Major Miguel Holguin. Accompanied by German Ferriola, another alleged mexican police official, he came to the bank on September 17, 1982, two months after its opening.

Ferriola bemoaned the fact that a lot of mexican officials had been exposed by the press for trying to get money out of Mexico and into the United States, at a time when severe economic and financial conditions were besetting Mexico. There were no U.S. dollars to be had at that time. All deposits by U.S. citizens in Mexico, which were deposited in dollars, were allowed to be withdrawn in pesos, at a very devaluated rate of exchange. Acosta represented that he could help such persons move money to the United States with complete confidentiality. In addition to being chairman of the board of the bank, Acosta was Vice President of the Desert Inn Hotel and Country Club in Las Vegas, Nevada, in charge of Latin American Affairs. He issued credit to mexican and other latin american gamblers and, subsequently, went overseas to collect these markers. Acosta moved

between $18 to $22 million dollars a year from these gamblers to the Desert Inn Hotel in Las Vegas, Nevada. At Acosta's suggestion, both men filled out signature cards using aliases which Acosta said he would hold in a special cabinet for handling accounts of that nature.

Afterwards, Acosta introduced both men to petitioner and showed petitioner the signature cards which these men were to use in the future and would deal in confidence with petitioner. Before leaving the bank, the agent displayed to Acosta the agent's Nevada driver's license and Mexico City police credentials.

One month later (November 14, 1982), the agent returned to the bank wearing (for the first time) a tape recording device. The conversation was strictly between the agent and Acosta. Petitioner at one time, entered the room briefly, spoke two words with Acosta and left.

On December 22, 1982, the agent (again equipped to tape record) brought $70,000.00 in cash to the bank. Petitioner asked if the agent wanted to open a checking account, savings account or a certificate of deposit. The agent did not state that he wanted to make a deposit; instead, he said he had $70,000.00 cash with him. The agent wanted to talk with petitioner in his office or in the conference room and petitioner called Rodriguez to join them. Petitioner cautioned the agent that a deposit of the entire amount would have to be reported. Petitioner then discussed hypothetical procedures to access the money; such as, $9,999.00 at a time. At that point, Acosta entered the room and directed that the entire $70,000.00 could be accepted, and that the agent would sign a paper reporting the deposit, but not with his real name because the agent (a mexican

national) did not have to pay taxes. Thereupon, Rodriguez produced a reporting form and directed the agent to fill it out and leave it at the bank but that it would not be mailed in. Rodriguez proposed that the account be put in a different name and the agent requested to use the card he signed "Manuel Orosco." Petitioner wanted to be assured that the agent would sign the declaration that: "This particular person is not a U.S. citizen and has got no social security number" to which the agent agreed. (Exhibit 3A, p. 6) Rodriguez returned to report that he could not find the earlier Orosco signature card and petitioner instructed Rodriguez to have him sign a declaration that he is not a U.S. citizen. Petitioner assured the agent that there would be no charge for accessing the money unless the transactions became so frequent as to involve a lot of hand-

ling and paperwork. Acosta verified that the agent had signed the declaration of alienage. Acosta insisted that the amount be handled in a lump sum. Petitioner insisted that a deposit of over $10,000.00 had to be reported on the IRS form, but Acosta took charge and insisted that he had more experience in this matter than petitioner. Acosta stated that these were his people and he knew how to handle it his way. Petitioner informed the agent that that was the first time he had worked in a bank. His banking experience was limited to being a director and organizer of the bank. The agent indicated his worry about the conversation between Acosta and petitioner by remarking to Rodriguez what amounted to that these people did not know what they were doing. Rodriguez replied that he was the banking expert and that he had seven years of banking experience.

On December 29, 1982, the agent brought an additional $90,000.00 to the bank. On January 5, 1983, the agent brought an additional $135,000.00 to the bank. On January 6, 1983, the agent withdrew $100,000.00 cash from the bank. On January 27, 1983, Rodriguez, at the request of the agent, arranged a wire transfer of $180,000.00 from the bank through Crocker National Bank in San Francisco to the People National Bank in Seattle, Washington. The other $15,000.00 was transferred to another account in the bank previously opened under the name Miguel Hogluin. While the money was at the bank, it was put in a repurchase agreement under the name of Jose Garcia. As such, it was handled in exactly the same fashion as all other repurchase agreements that other customers had with the bank. Interest was regularly credited, although the interest

was never claimed by the agent when he terminated his relationship with the bank. To the best of petitioner's knowledge, the interest was still in that account.

The use of the repurchase agreement ("Repo") is very significant because a supervisor with the Federal Deposit Insurance Corporation ("FDIC") testified at trial that a repurchase agreement is not insured by the FDIC. It is a private deal between a bank and its customer, where a customer purchases a portion of the bank's security portfolio. In case of a bank failure, the customer looks to the bank's security portfolio for the repayment and not to the FDIC.

Benjamin Fernandez, an independent consultant who helped petitioner and Acosta in the organization of the bank, testified that in December, 1982, he was contacted by Acosta. Fernandez advised

him on the use of repurchase agreements, including expressing the opinion that requirements for reporting currency transactions, had no applications to repurchase agreements; that such requirement related only to deposits insured by the FDIC. (RT 840).

No where in any of the tape recorded conversations, did the agent indicate that the source of the money was illegal. Nor did petitioner or anyone else believe that the source of the money was questionable. In fact, at each and every conversation where Acosta and agent were present, the conversation centered on the rate of exchange of pesos to dollars in Mexico. The money was brought in 5, 10 and 20 dollar bills, to further indicate the difficulty of obtaining large bills at a time when Mexico was in financial turmoil. However, all press releases and all statements opening and closing during

trial, referred to laundering of drug money; not to mention the references made to laundering drug money in that confidential ex parte memorandum to the trial judge before the beginning of the trial.

REASONS WHY REVIEW SHOULD BE GRANTED

Hundreds of sting operations have been conducted by the government in the last few years. Petitioner believes that aside from the fact that these sting operations are misguided, when it comes to the Currency Transaction Reporting Act the circuit Courts of Appeal have constantly misinterpreted the statute. These sting operations have not netted the government any criminal activity but have managed to snare innocent people. The circuits seem to differ on the interpretation of the statute. In fact, there seems to be a conflict in the Ninth Circuit alone as to what the statute

really says. Petitioner believes that this is a case of first impression to the Supreme Court. Aside from the violation of petitioner's constitutional rights, the importance of this statute will have a severe impact on the way americans and foreigners conduct business in the United States. Petitioner maintains that the Secretary of Treasury has usurped Congress' power to enact statutes and rewrote the law as he saw fit. Such resurping of power goes to the heart of the Constitution which holds that all three branches of government shall be independent.

I. The First Question Presented

Congress enacted Public Law 91-508 on October 26, 1970. Sections 221 and 222 of Title II of that law are the pertinent portions of the first question presented.

(84 Stat. 1122.)[1] When later codified as 31 U.S.C. §§ 1081 and 1082, they were verbatim transcript of §§ 221 and 222 of Public Law 91-508. When Public Law 97-258 was enacted on September 13, 1982

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§ 221. **Reports of currency transactions required**

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

§ 222. **Persons required to file reports**

The report of any transaction required to be reported under this chapter **shall be signed** or otherwise made **both** by the **domestic financial institution** involved **and** by **one or more of the other parties** thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the **report shall identify the person or persons on whose behalf the transaction is entered into**, and **shall be made by the individuals acting as agents or bailees with respect thereto**. (Emphasis added.)

(96 Stat. 996) the pertinent sections and § 1083 of the previous U.S.C. code became 31 U.S.C. 5313.[2] In enacting Public Law 97-258, Congress was careful to state that the law was more a revision of language than of substance. The statute was enacted:

"To restate the laws related to money and finance in one comprehensive title, it is necessary to make changes in language. Some of these changes are neces-

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§ 5313. **Reports on domestic coins and currency transactions**

(a) When a domestic financial institution is involved in a transaction or the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, **the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction** at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made. (Emphasis added.)

sary to attain uniformity within the title. Others are necessary as a result of consolidating related provisions of law and to conform to common contemporary usage. In making changes in the language, precautions have been taken against making substantive changes in the law." (Emphasis added.) (U.S. Code Congressional and Administrative News, Vol. 3, 97th Congress, Second Session, p. 1896.) As further proof that no substantive changes were made nor intended, House Report 97-651 states:

"As in other codification undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions or other interpretations. This

fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification of law, however, the courts uphold the contrary presumption: the law is intended to remain **substantively** unchanged." (Emphasis added.) (U. S. Code Congressional and Administrative News, Vol. 3, 97th Congress, 2nd Session, p. 1897.)(1982)

Public Law 91-508, § 222, makes it mandatory, that should a report be prescribed by the Secretary of the Treasury, it shall be **signed** or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein. As further indication of Congress' intent that the report, should one be prescribed by the Secretary of the Treasury, shall be

signed by the domestic financial institution and by at least one participant to the transaction is the legislative history of PL 91-508:

"These reports must be signed **both** by the domestic financial institution involved and by one or more of the other parties thereto. (U.S. Code Congressional and Administrative News, Vol. 2, p. 4396, 91st Cong., 2nd Sess. 1970). (Emphasis added.)

IN THE SECTION-BY-SECTION EXPLANATION OF PURPOSES AND LEGAL EFFECT OF THE BILL (U.S. Code Congressional and Administrative News, Vol. 2, p. 4399), Congress gave its reasons for requiring the domestic financial institution and at least one participant in the transaction to sign such a report. "The bill requires that reports be filed by **both** the financial institution involved and by one or more of the other parties

to or participants in the transaction, as the Secretary may require. The purpose of this is two fold. **First, it permits the prosecution of a person who supplies false information for such a report and signs it. Secondly, it relieves the institution of any pressure the Secretary of the Treasury might otherwise be inclinded to exert to require it to submit reports of this type without notifying the customer.** The latter procedure raises serious questions with respect to the fiduciary duty of financial institutions to their customers, not to mention the right of privacy or simple fairness." (U.S. Code Congressional and Administrative News, Vol. 2, p. 4407, 91st Cong., 2nd Sess. 1970.) (Emphasis added.)

The Secretary of the Treasury has never prescribed a form that can be signed by both parties. The only form

that is available is IRS form 4789. This reportiong form only requires the financial institution to sign it. In U.S. v. Reinis, 794 F.2d 506, (July 1986) the Ninth Circuit held that the currency transaction reporting form was not effective as a regulation under the reporting act, where such form was never promulgated pursuant to the rule making requirements of the Administrative Procedure Act. 31 U.S.C. § 5313(a); 5 U.S.C. § 553. Petitioner alleged in his appeal that no such form exists. However, a different panel of the Ninth Circuit Court found that he violated form 4789 of the Internal Revenue Service Code. (A-25).

If indeed such form has never been prescribed, nor is the form available the one Congress has intended, then petitioner cannot be guilty of failing to file such a report nor of filing a

false one; and consequently could not be guilty of a conspiracy to fail to file one.

This aspect of petitioner's motion for acquittal was a subject of considerable debate at the hearing on the motion (RT sentencing, p. 3-5 et seq). However, the judge ultimately ruled the issue against petitioner without expressing any reason therefore (RT sentencing, p. 38).

On July 9, 1986, petitioner's motion for rehearing and suggestion for rehearing en banc was denied. One of the panelists, Circuit Judge Schroeder of the Ninth Circuit, had previously indicated while affirming petitioner's conviction, that petitioner points to no authority for his proposition indicating that a CTR form has never been designated. (A-25). Circuit Judge Schroeder, on July 13, 1986, in U.S. v.

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Reinis, supra, held along with the other panelists, Circuit Judges Hall and Hardy, that indeed the Secretary of the Treasury never promulgated the reporting act pursuant to the rule making requirements of the Administrative Procedure Act. Since Circuit Judge Schroeder affirmed petitioner's conviction and did not file a dissenting opinion in Reinis, petitioner finds this stand inconsistant in the same circuit and the same circuit judge. Such inconsistancy requires the Supreme Court's interpretation.

The Supreme Court will note the discrepancy in language between the Public Law as enacted and the subsequent codification. Petitioner maintains that the subsequent codification is not as precise as the Public Law initially enacted and viewed by Congress.

II. The Second Question Presented

Petitioner takes issue with the subsequent codification of Public Law 91-508 § 210.[3] Section 210 subsequently became 31 U.S.C. § 1059, without any changes. In its later codifications in 1982, § 210 became 31 U.S.C. 5322(b).[4]

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[3] § 210. **Additional criminal penalty in certain cases.**

Whoever willfully violates any provisions of this title where the violation is --

(1) committed in furtherance of the commission of any other violation of Federal Law, or

(2) committed as **part of a pattern of illegal activity** involving transactions exceeding $100,000 in any twelve-month period, shall be fined not more than $500,000 or imprisoned not more than five years, or both. (Empahsis added.)

[4] § 5322. **Criminal penalties**

. . .

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined no more than $500,000, imprisoned for not more than 5 years, or both.

The court will note the difference in language between the two sections. The word "regulation" appears where it was not in the initial statute. "While violating another law of the United States" is a substantive change from "Committed in furtherance of the commission of any other violation of federal law." In § 210(2), transactions had to exceed $100,000.00 in any twelve month period. In § 5322 the word exceeds has been replaced by more than.

The indictment charges that petitioner's failure to file Currency Transaction Reports was committed as part of a pattern of illegal activity involving transactions exceeding $100,000.00 in any twelve month period. Therefore, by implication, Petitioner was not found to be in violation of § 210(1) i.e. petitioner's conduct was "not committed in

furtherance of the commission of any other violation of Federal Law."

If Petitioner is not guilty of violating another Federal Law under § 210(1), then how can his conduct be a part of pattern illegal activity under § 210(2), in light of the fact that Petitioner was not charged with violating any other state law either?

PL 91-508 § 209 provides for a criminal penalty for "whoever willfully violates any provision of this title or any regulation under this title shall be fined not more than $1,000, or imprisoned not more than one year, or both."

Petitioner maintains that, in order to trigger the enhanced penalty under § 210, the seriousness of the crime must be of such magnitude as to deserve a 500,000 percent increase. Petitioner maintains that the language of this statute, even

in the original, is vague. It is subject to multiple interpretations. In U.S. v. Emmons, 410 U.S. 396 (1973), the Court held that criminal laws are to be strictly construed. In Kolender v. Lawson, 461 U.S. 352 (1983), the Supreme Court stated that a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Thus the provisions of § 210 are void for vagueness. In U.S. v. Missouri Pacific Railroad, 278 U.S. 269 (1929), the plain meaning rule found its origin. The court held that where the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the

final expression of the meaning intended.

Not charging petitioner, under § 210(1) but charging him under § 210(2) is absurd. If petitioner is involved in a pattern of illegal activity, then by implication he is violating at least another law of the United States, if not several more. However, the indictment does not charge that he violated any other federal law but strictly that it was part of a pattern of illegal activity. Not only the government failed to explain what pattern of illegal activity was, it failed to prove that petitioner was involved in any other illegal activity.

The statute is also silent as to what constitutes a pattern of illegal activity. If petitioner's failure to file Currency Transaction Reports or filing a false one constitutes the **part** portion,

such as in part of a pattern, then where is the pattern of the illegal activity. A careful review of the legislative history of this section does not shed any more light on what constitutes the pattern of illegal activity. In the **SECTION-BY-SECTION EXPLANATION OF PURPOSES AND LEGAL EFFECT OF THE BILL,** (U.S. Code Congressional and Administrative News, Vol. 2, p. 4406 (91st Cong. 2nd Sess. 1970), Congress indicated that serious violations under this title may involve very large sums of money, and fines of as much as $10,000.00 or more might be shrugged off as a mere cost of doing business. To have any real deterent effect, the potential fine must be large enough to have some economic impact on potential violators.

Under domestic currency, a hint is given as to what may constitute pattern

of illegal activity. (U.S. Code Congressional and Administrative News, Vol. 2, p. 4396 (91st Cong. 2nd Sess. 1970). The report finds that money in many of these transactions may represent anything from the proceeds of a lottery racket to money for the bribery of public officials. Petitioner does not contend that proceeds of a lottery racket or bribery of public officials is the only way or pattern of illegal activity could occur. However, the only instance that petitioner can recollect where this particular type of language is used is with the RICO statute.

On February 7, 1985, the First National Bank of Boston was fined $500,000.00 in federal court after pleading guilty to failing to report cash transfers of **1.2 billion dollars.** The failure to report included 998 deposits

and 170 withdrawals a total of 1,168 transactions. (New York Times, Feb. 8, 1985, p. 1, col. 5.) The average size of each transaction amounted to $1,027,397.26, and the penalty amounted to $428.08 per transaction.

The Treasury Department levied and Bank of America agreed to pay the record 4.75 million dollars in **civil** penalties for failing to report cash deposits or transfers of more than $10,000.00 between 1980 and 1985. The Treasury has imposed **similar** (civil) penalties on twelve other banks in the past eleven months. The government, however, did not accuse Bank of American of dealing with organized crime. (Time Magazine, Feb. 3, 1986, p. 58.) (Emphasis added.)

Recently, Crocker National Bank of California, was fined 2.25 million dollars in **civil** penalties for failing to

report approximately 7,900 currency transactions. More than **4.5 billion** was involved in these transactions. The violation of each transaction by Crocker National Bank was punished by a civil penalty of approximately $225.00, i.e., one fourth of what Congress has required under § 207of PL 91-508.

If none of these thousands of transactions by all the aforementioned institutions constitute a part of a pattern of illegal activity as defined by § 210(2), then how can four violations by petitioner constitute a part of a pattern of illegal activity meriting the enhancement penalty of a $500,000.00 fine. The government contends that two violations in any twelve month period of the currency transaction reporting Act totalling more than $100,000.00 could trigger a $500,000.00 penalty. So, the deposit of

a $50,001.00 into an account on a Monday and the withdrawal of $50,000.00 from that same account and money on Tuesday, both transactions unreported, would trigger a $500,000.00 penalty according to the government. The government does not explain how it intends to collect the $500,000.00 fine from someone who only has $50,000.00.

On the other hand, one single transaction, regardless how illegal or how the money was obtained, in the billions of dollars, unreported, would only trigger a $1,000.00 fine. The statute speaks of transactions in the plural. Therefore, the unreported transactions must be more than one. Should, therefore, someone decide to transfer one time only, 1 billion dollars or more, he could legitimately escape any penalty except for $1,000.00. However, should on the other

hand, a person structure two deposits to exceed $100,000.00 in two separate transactions as discussed earlier, he would be fined $500,000.00. Such cannot be the intent of the law, for the first individual would have escaped total liability, the second would have been subjected to cruel and unusual punishment, in contravention of the Constitution of the United States.

Government, itself, has taken contradicting views of the construction of the enhancement provision. In United States v. Dickinson, 706 F.2d 88 (2nd Cir. 1983), there was only one reporting violation as to leaving the country with $860,000, but the prosecution argued for penalty enhancement on the basis the defendant's activities were related to other arguably illegal conduct. The court rejected the argument but said, in

apology, and in violation of the rule of strict construction:

> . . . We believe the latter interpretation is correct, although we dispense with any pretense that the legislative history and other relevant criteria disclose a clearly marked trial.

In U.S. Reinis, supra, the court held that criminal penalties for failure to report currency transactions under the Reporting Act can attach only upon a violation of regulations promulgated by the Secretary of the Treasury. To violate the regulations, the regulations must prescribe to the will of Congress. In this instance, petitioner should not be found guilty of the enhanced penalty where the Secretary of the Treasury has failed to conform the report to the wishes of Congress.

In U.S. v. Booky, 733 F.2d 1335 (9th Cir. 1984) the court correctly noted that the predecessor of § 5322(b), 31 U.S.C. § 1059, was worded somewhat differently and accepted defendant's argument that the language should control all the interpretation of § 5322(b). In Booky the defendant was charged with failure to file a report with the Secretary of Treasury and falsely reporting the same report in an earlier statement to custom agents. The court held that 18 U.S.C. § 1001 was a catch-all provision to where both the false statement and the failure to report merged into the false statement. Petitioner was charged by the government of failing to report a $135,000.00 cash brought to the bank on January 5, 1983. He was additionally charged with falsely reporting such amount to the government. Petitioner maintains that being charged for the same al-

leged crime twice is a violation of the Double Jeopardy Rule. In Booky, supra, the Ninth Circuit held that his violation of the False Statement Statute, 18 U.S.C. § 1001, may not be used to enhance his penalty under 31 U.S.C. § 5322(b). His sentence was vacated and remanded to the district court for resentencing under 31 U.S.C. § 5322(a), a misdemeanor. Petitioner prays for an equal interpretation of his conviction.

PL 91-508 § 207[5] provides for a $1,000 **Civil Penalty** for each willful violation of this title by any financial institution and any partner, **director,** officer or employee thereof.

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[5] § 207. **Civil penalty**

(a) For each willful violation of this title, the Secretary may assess upon any domestic financial institution, and upon any partner, **director, officer or employee** thereof who willfully participates in the violation, a civil penalty not exceeding $1,000. (Emphasis added.)

At the time of the alleged offenses, petitioner was Vice Chairman of the Board of Directors in the Bank, i.e. a director. But instead of a total of $4,000 in civil penalties for four transactions, the government elected the most severe criminal penalty under § 210, a penalty reserved for someone engaged in other criminal activity in conjunction with the violation of the Currency Transaction Reporting Act, one who is directly benefitting from both activities.

It was not by sheer coincidence that Title II of PL 91-508 was structured the way it was. Section 201 deals with the name of the title.

By specifically enacting § 207 and distinguishing it from other sections, dealing with willful failure to file a report, where a proper one exists, Congress intended it to be the only penalty to be imposed on a director or officer of a finan-

cial institution or else the need for the section would be useless, cummulative and absurd.

Section 207's legislative history indicates that Congress intended that "the availability of relatively modest sanctions is of great importance in assuring compliance with regulations of the type contemplate flated by this bill." (U.S. Code Congressional and Administrative News, Vol. 2, p. 4405)(91st Cong., 2nd Session 1970).

Not only petitioner was not guilty of any prior violation of the reporting act, prior to the beginning of the "sting" operation on December 22, 1982, he was equally not guilty of any subsequent violations of the reporting act between the end of the operation on January 6, 1983 and the resulting indictment on July 6, 1983.

Petitioner therefore prays the Court for a similar interpretation of § 207.

III. The Third Question Presented

Although this issue was not brought up on appeal, petitioner prays the Court to permit him to present it since it involves a question of denial of due process. In Carlson v. Green, 446 U.S. 14 (1980), the Court held that nothing precludes this Court from hearing it.

On January 6, 1984, petitioner and his counsel, along with co-defendant Acosta and his counsel, took a statement from the third co-defendant, Richard Rodriguez in the presence of his counsel and a court reporter. The statement was freely and willingly given without duress or coercion. It was given approximatley 2 months after co-defendant Richard Rodriguez had entered a plea of guilty to the conspiracy count and had been granted probation for his cooperation by the government. Petitioner's counsel represented that the statement was for informational purposes only. Rodriguez's counsel

requested the statement not be used for impeachment purposes. Petitioner's attorney stipulated so. Petitioner believes that the statement given on that date was very candid In nature due to the fact that Rodriguez' attorney stated as a matter of accomodation, he would have his client answer any and all questions that petitioner and his attorney had or any other subsequent questions that would arise in the future. Petitioner believes Rodriguez was telling the truth at that time. The statement was exculpatory in nature and disproved petitioner's guilt. Rodriguez' recollection of the activity that led to the indictment was fair but he maintained that he didn't do anything wrong; and he still, and up to the time of the indictment, believed that Currency Transaction Reports need not have been filed on foreigners. The government requested a copy of the statement from Rodriguez' attorney, which copy was provided. The government, which

had maintained for one year, in the media, that the bank was involved in millions and millions of dollars of money laundering, found its case crumble under Rodriguez' statement. At trial, Rodriguez' testimony was diametrically opposed to the statement he had given on January 6, 1984, six months prior. On cross-examination, petitioner's counsel sought to refresh his memory as to the statement given which was inconsistent with the testimony in the courtroom on that date. The government acknowledged having a copy of Rodriguez' statement. (RT 571). The prosecutor objected to its introduction since it would have impeached his star witness. The court found that petitioner's counsel was obviously trying to impeach the witness. Neither the statement was allowed to be introduced into evidence nor was the witness allowed to be cross-examined on it for fear of impeachment. There was no ruling to that effect, however, the court

indicated its displeasure with the way petitioner's counsel was impeaching co-conspirator Rodriguez.

Petitioner maintains that it was prejudicial error for the trial court not to allow the cross-examination of Rodriguez on his own statement even if the effect would have been to impeach him. This error was of such constitutional magnitude that it deprived petitioner of the right to cross-examine his accuser. Moral and ethical considerations require a prosecutor to seek justice and not conviction. Furthermore, the government had no standing to object to the introduction of the statement or the cross-examination on it. In the first instance, the government was not a party to the statement. In the second, the prosecution should have brought it to the attention of the court on its own' since it would have negated petitioner's guilt and rendered the entire trial moot. In fact, the prosecution

was duty bound to present the statement and bring it to the attention of the court. Petitioner maintains that he should have been allowed to cross-examine Rodriguez on a prior inconsistent statement just as the government would have under Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971). In Harris, the Supreme Court held that the prior inconsistent statement prior to a Miranda warning, may not be used against a defendant in a court proceeding, except when the defendant takes the stand. At that time, the prior inconsistent statement may be used for purposes of impeachment if not obtained by duress or coercion. The court held that a Miranda warning should not be a fertile ground for perjury. Petitioner obtained Rodriguez' statement willingly, freely and in the presence of his counsel. Rodriguez' counsel stipulated that he would instruct his client to answer all questions truthfully including any subsequent ques-

tions petitioner may have. If these questions were answered truthfully, the stipulation that they would not be used for purposes of impeachment would be moot. The truth itself cannot be impeached.

Petitioner prays that the court reverses his conviction or, in the alternative, remand for a new trial where the statement can be used.

IV. The Fourth Question Presented

When Rodriguez was allowed to withdraw his plea of guilty subsequent to petitioner's trial, petitioner moved the court for a new trial since there was no one else left for him to conspire with. Armed with three affidavits, one of which sworn by Rodriguez' first attorney, Joseph Houston of Las Vegas, petitioner found that as early as January of 1984, Rodriguez' was boasting about his attorney going back into court after petitioner and Acosta's trial and withdrawing

his plea of guilty. In addition to the three affidavits, William Cavanaugh, a now retired probation officer who supervised the guilty plea of Rodriguez, the Bank and petitioner, indicated in a letter, written to Judge Marquez, that the circumstances surrounding the plea of guilty Rodriguez had entered, and the ones represented by the government for the withdrawal of his plea of guilty, were not all totally truthful. Mr. Cavanaugh, petitioner believes, also indicated to the Judge that the bank that had plead guilty to a failure to file a Currency Transaction Report and fined $125,000.00, was approached by the prosecutor after petitioner's trial and suggested it withdraw its plea of guilty. The letter was sealed by the trial judge and at the request of petitioner forwarded to the Ninth Circuit Court of Appeals for its consideration in his appeal. However, the opinion of the Circuit Court does not indicate whether it ever

reviewed this letter or looked at it. Representations made by petitioner in this instance regarding the letter are from conversations that he had has with Mr. Cavanaugh and has not personally seen the letter which he believes remains under seal.

While acting indignant and maintaining that no deal was cut with Rodriguez, the government nevertheless welcomed the evidentiary hearing on the motion for a new trial. However, in its reply brief to petitioner's brief re: denial of new trial, filed on December 3, 1985, the government changed its tune a bit by alleging that petitioner's counsel failed to ask the proper questions of Rodriguez. These questions would have been proper had petitioner or his counsel suspected a deal between Rodriguez and the government. However, except for Rodriguez, his attorney and the prosecutor, with the possibility of one or two IRS agents on the case, no one else knew of the deal to con-

vict petitioner while turning everybody else loose. Petitioner had no reason to suspect that a special deal was cut.

The district court denied an evidentiary hearing for a new trial while assuming the truthfulness of petitioner's allegations. (A-26).

It was therefore prejudicial error to petitioner to deny him a motion on a new trial, or at least an evidentiary hearing to that effect.

IV. The Fifth Question Presented

Petitioner was deprived of a fair trial by references to laundering of money made and repeated by the prosecution. The test is whether the improprieties in the prosecutor's opening statement and summation, viewed against the entire argument before the jury, deprived the defendant of a fair trial. United States v. Wilkinson, 754 F.2d 1427, 1435 (2nd Cir. 1985). The fair trial

is well defined in the United States v. Mandell, 746 F.2d 155, 159 (2nd Cir. 1984):

> "The Constitutional standard is fairness not perfection. It is nonetheless, and rightfully, a high standard, for the court in a criminal case deals with the life and liberty of an individual. See generally, Fay v. Noia, 372 U.S. 391, 83 Sup. Ct. 822, 9 L Ed. 2d 837 (1963). Thus, it matters not whether Mandell may have actually known of some unindicted practices. Absent proof at trial, the law is blind. Our laws require that a presumptively innocent citizen be proven guilty by his government in a trial of specific charges. . ."

The statement of fact described the prosecutor's references to money launder-

ing which were based on erroneous information from other government agents/ informants. (RT 9, 15).

The prosecutor's opening statement referred to "laundering" in numerous instances and objections were made (RT 9, 15) but not allowed by the trial judge. The final summation of the prosecutor's returned to the theme of "laundering money." (RT 979).

No objection was interposed this time, but in view of the fact that the prosecutor later **admitted** there was never any intelligence information or informant information that petitioner's had any connection with narcotics (RT sentencing, 40), this is plain error and repeated error originally objected to. This meets the standard of plain error under United States v. Young, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). The fundamental fairness of the trial was undermined and this

accounts for the fact that petitioner was convicted and Acosta was acquitted.

Nor did the fact that the prosecutor referred to petitioner in the closing argument as a foreigner help matters any.

VI. The Sixth Question Presented

The petitioner was entitled to have the jury consider his instruction on entrapment. United States v. Wellington, 754 F.2d 1457, 1463 (9th Cir. 1985) describes the standard for error or refusal to give jury instructions:

> When viewing the challenge to the jury instructions we consider the instructions as a whole. The district court was given instructions relating to any legitimate theory of defense that is supported by evidence. A perfectly formulated jury instructions will serve as a basis for overturning a con-

viction only upon a showing of abuse of discretion.

The foregoing statement of facts show this was an undercover operation in which an IRS agent and a mexican official working in cooperation with federal authorities and the IRS agent set out to achieve the incrimination, prosecution and conviction of petitioner, luring the petitioner with representations of large sums of money to be made accessible to the bank, and following through with the deposit of $295,000.00 (a sum equal to between 2 and 5% of the entire deposits of the bank) (RT 525). Petitioner was induced to assist in maintaining the secrecy of the currency transactions by the conduct of Agent Berry. Petitioner did not receive any personal benefit from the transactions, but was lured to participate in various manipulations out of a

concern for the development of the bank. Playing on inexperienced persons, the agent induced petitioner to engage in discussions of secret transactions and to accept the directions of Rafael Acosta, (who was also inexperienced in banking) regarding freedom from currency reporting requirements and the use of deposits by foreigners, and the use of repurchase agreements. Neither petitioner nor Acosta understood the requirements for reporting and Agent Berry played on their ignorance to insure them. This is clearly a case calling for an instruction on entrapment, petitioner's legitimate theory of defense and the trial judge, unaccountably, refused to give any instruction to the issue.

The proper instruction was requested (ER 11, CR 199, defendant's proposed jury instruction A, p. 2). The instruction was refused by the court (RT 866, 869),

and the petitioner recorded his objection thereto (RT 888). Although the court asserted that the instruction was not properly phrased, the court did not point to any deficiency therein. (RT 886, 888, 869).

The defense of entrapment precludes conviction when there is no evidence of defendant predisposition to commit a crime and where the criminal conduct was a product of creative activity of law enforcement officials; the burden was on the prosecution to show that petitioner was predisposed to commit the crime where the agent first approached the petitioner. United States v. Lasuita, 752 F.2d 249, 252 (9th Cir. 1984). The jury question exists as to whether or not petitioner was predisposed, and reversible error existed when the judge refused to instruct on entrapment. As shown by the admission of the prosecutor at the sen-

tencing that petitioner had no disposition to "launder drug money" the government had no evidence that petitioner was predisposed to commit a crime. Predisposition cannot be shown on the basis that petitioner committed the crime he was induced to commit. United States v. Parisi, 674 F.2d 126 (4th Cir. 1982); United States v. Deermore, 672 F.2d 738 (9th Cir. 1982).

VII. The Seventh Question Presented

Petitioner is aware that the Supreme Court does not normally decide issues not presented below. However, nothing precludes the court from doing so. Carlson v. Green, 446 U.S. 14 (1980). This particular question was presented in the district court but not on appeal. Petitioner begs the court's indulgence in allowing to present this question. At petitioner's arraignment the government

stated that this was an open case implying that all evidence pertinent to the trial would be turned over to the defense soon. However, almost one year after the indictment and the seizing of the evidence, nothing of any value had been turned over to the defense. It wasn't until two weeks before the trial which was held on June 26, 1984, that the government turned any evidence to the petitioner. It was at that time that defense realized that the government had used two (2) search warrants to search the bank's premises and petitioner's office. The first search warrant is not in contention and yielded practically nothing. It was obtained at about 4:34 p.m. on July 13, 1983. The second search warrant obtained at 11:59 p.m. of the same date yielded a tremendous amount of evidence. (A-52). That search warrant was obtained pursuant to an affidavit of

J. Thomas Hampton (an IRS agent with the criminal investigation division on the case). It was made in bad faith or in reckless disregard for the truth. In every material way, the affidavit of Agent Hampton is contradicted by the subsequently obtained statement of every person he allegedly relied on to obtain the search warrant. The affidavit was made on July 13, 1983. In it, Agent Hampton alleges that conversations with Richard Rodriguez and YVONNE SABLITCH were the basis of his affidavit to the search warrant. In fact, the conversation with Richard Rodriguez did not take place until July 19, 1983, six days after the sworn statement. In that statement, Rodriguez contradicts in every way the allegations made by agent Hampton to obtain the search warrant. The conversation that Hampton alleged he relied on with YVONNE SABLITCH on July 13 to obtain

the second search warrant did not occur until July 20, 1983, (seven days after the affidavit). In it YVONNE SABLITCH contradicts in every way the allegations of Agent Hampton. Petitioner moved to suppress the evidence on June 22, 1984, four days before trial and one week after obtaining the evidence from the government. (A-74) Relying on Franks v. Delaware, 438 U.S. 154, 98 Sup. Ct. Rptr. 2674 (1978), petitioner stated that where the false affidavit is made in bad faith or in reckless disregard of the truth, the warrant must be voided.

It is submitted that the attack that petitioner made upon the affidavit of Mr. Hampton, meets in every regard, the requirements established by the Supreme Court to warrant an evidentiary hearing. The district court, however, did not rule on the motion. On July 13, 1984, petitioner filed a motion for a new trial

after he had been found guilty of all the charges and renewed his motion to suppress the illegally obtained evidence. Petitioner pointed out, for the second time, the evidence seized by the government illegally. On October 5, 1984, the sentencing date of petitioner, summarily and without an evidentiary hearing, the district court denied all previously made motions from June 22, 1984 and those renewed on July 13, 1984.

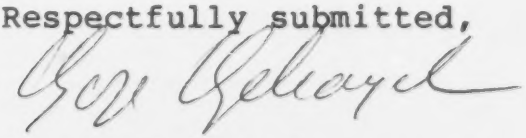
The prosecutor admitted the evidence obtained in the second search warrant was illegally seized by representing to the Court that none of it was used during the trial. Judge Marquez chose to believe the government's misrepesentations. Petitioner maintains that a cursory review of the trial record or the government's exhibits would have reached an opposite conclusion.

Petitioner contends that such an abuse of discretion by the district court was prejudicial and denied him the right to a fair trial. The evidence seized was a violation of petitioner's constitutional rights under the Fourth Amendment to the Constitution to be free of search and seizure of his personal papers.

CONCLUSION

Accordingly, petitioner prays the Supreme Court to summarily reverse the judgment of the court below. Should the court decline to summarily reverse, petitioner submits that constitutional considerations justify review in this case. Petitioner respectfully requests, in the alternative, that the court grant his petition.

Respectfully submitted,



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